George Mason Law Review Antitrust Symposium
"HOT TOPICS IN EU ANTITRUST LAW: WHAT EVERY MULTINATIONAL NEEDS TO KNOW"

Remarks by

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September 20, 2005

"STATE INTERVENTION: A STATE OF DISPLACED COMPETITION"

I. Introduction - State Intervention in Europe

I am pleased to open the George Mason Law Review's Antitrust Symposium on "Hot Topics in EU Antitrust Law." One year ago at this conference, I recognized my dear friend, outgoing Competition Commissioner Mario Monti for his legacy of reform of EC antitrust and merger enforcement. Today, I want to highlight the work of my new friend and colleague, Commissioner Neelie Kroes, for her work in battling the displacement of competition by governments in the European Union, including both financial intervention - state aids - and non-financial restraints on competition that we in the United States call "state action." Indeed, I understand that Commissioner Kroes is unable to join us today because tomorrow she has an important Commission meeting during which members will discuss state aid to innovation.[1]

The founders of the European Economic Community recognized that the Community needed tools to fight both private and public restraints on competition, including state-granted financial assistance favoring certain enterprises that distorted competition,[2] and, therefore,

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[1] On June 7, 2005, the European Commission issued a proposed State Aids Action Plan for public consultation. Materials concerning the proposals are available on the website of the European Commission's (EC) Competition Directorate (DG COMP), *available at* http://europa.eu.int/comm/competition/state_aid/others/action_plan/.

[2] Comité Intergouvernemental créé par la Conférence de Messine, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangeres (Bruxelles, 21 Apr 1956), known as the Spaak Report (abridged, unofficial

included state aids control in the Competition policy chapter of the 1957 Treaty of Rome ("EU Treaty"). In addition, the EU Treaty contains bold language obligating the Member States to "abstain from any measure which could jeopardize the objectives of [the] Treaty,"[3] and in furtherance of this mandate in the field of competition policy, the European Commission ("EC") has ruled that Member States should refrain from legislative or other measures that "may render ineffective the competition rules applicable to undertakings."[4] The Treaty gives the EC several tools with which to challenge state interventions that may inappropriately contravene the competition rules. Those tools include Article 86, which empowers the European Commission to deal with anticompetitive acts of public companies or private firms to which the state has granted special or exclusive rights, and Articles 87-89, which empower the EC to act against state financial aids that distort competition.

State aids control, in particular, demands a significant amount of resources, time, and energy from the Competition Commissioner and DG COMP, with about 25 percent of DG COMP's staff devoted to state aids control. It also is intensely political, as it pits the Commission against Member State governments that seek to advance other national interests to the detriment of competition. However, non-financial state intervention also can involve high political stakes. In their encyclopedic article presented at the Fordham conference in 2003, the

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translation entitled, The Brussels Report on the General Common Market, at 13, *available at* http://aei.pitt.edu/archive/00000995/01/Spaak_report.pdf.

[3] EU Treaty, Art. 10.

[4] *Comm. v. Italy (CNSD)*, Case C-35/96, 1998 ECR I 3831 (ECJ), point 53, (affirming the Commission's finding of a Treaty infringement), *cited in* Richard Wainwright and André Bouquet, *State Intervention and Action in EC Competition Law*, 2003 Fordham Corp. L. Inst. 539, 540, n. 7 (B. Hawk ed. 2004). (In *CNSD*, Italian law provided that the association of customs agents set their fees without any review by the Italian government.)

EC's Chief Legal Advisor, Richard Wainwright, and André Bouquet, a member of the EC's Legal Service, highlighted the seemingly conflicting policy objectives that the European Court of Justice has tried to balance in these situations: "on the one hand, to establish a broad state obligation based on the need to preserve the effectiveness of competition rules, or, on the other, to respect and preserve the right of the State to restrict competition in the public interest and limit antitrust rules to undertakings."[5] The authors go on to say that "for [those] who identified the danger of centralization and undue judicial interference with policy choices of the Member States, the case law has shown appropriate deference to State decisionmaking."[6]

Commissioner Kroes is seeking to reform state aids control in the EU. The overall aim of the reform effort is the expenditure of "less and better targeted aid" -- but in any event, no aid that distorts competition. Even as she pushes for reform of state aids, she faces a variety of non-financial state intervention challenges, given recent declarations by Ministers in some Member States. Several Member States have declared, for example, that certain industries -- even certain companies -- deserve protection from the state. The protection might be in the form of state aid

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[5] Wainwright and Bouquet, *supra*, note 4. For example, in 2002, the European Court of Justice reviewed the system under which legal fees are set in Italy. The Italian legislation provides that the bar association prepares and submits a proposed schedule of fees to the Ministry of Justice. The Minister reviews the proposed schedule with the assistance of two public bodies whose opinions he must obtain before the fee schedule can be approved. Moreover, the court noted that in certain circumstances, Italian courts may depart from the maximum and minimum fees stipulated. The ECJ decided that "the Italian state cannot be said to have delegated to private economic operators responsibility for taking decisions affecting the economic sphere. . . nor [does it] require or encourage the adoption of agreements . . . contrary to Article 85 [now, 81]." The ECJ concluded by saying,

> Articles 5 and 85 of the Treaty [now 10 and 81, respectively] do not preclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession, where that State measure forms part of a procedure such as that laid down in the Italian legislation.

Arduino, Case C-35/99, Judgment of the European Court of Justice, 19 Feb. 2002, 2002 ECR I-1529, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61999J0035:EN:HTML.

[6] *Id.*, at 551.

or it might be in the form of opposition to a takeover by a foreign firm. The EC successfully challenged Portugal's government several years ago when it attempted to stop Banco Santander of Spain from acquiring interests in Portuguese banks.[7] On appeal, the European Court of Justice ruled that Portugal violated Article 73 of the EU Treaty, providing for the free movement of capital.[8] Despite that Commission success, however, we have learned in recent months that Italy's Central Bank Chief has tried to thwart efforts by foreign -- albeit, other European -- banks to take over an Italian bank. Also, high-ranking officials of the French government have declared the yogurt-making company, Danone, an "industrial treasure" apparently deserving of French government protection from possible takeover by a foreign firm, namely PepsiCo of the United States.[9]

II. State Intervention in the United States

A. Overview

EC control of state intervention -- state aids, in particular -- often has been treated in the United States as a set of tools developed to deal with a uniquely European issue – that is, the breaking down of national barriers to the creation of a unified market. In the United States, of course, we do not have so formal a program as "state aids control." But the situation in Europe that I have described should ring a familiar note here in the United States. The U.S. Congress

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[7] *BSCH/A. Champalimaud*, Case IV/M.1616, Commission decision of July 20, 1999, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m1724_19990720_1290_en.pdf.

[8] *Commission v. Portugal*, Case C-367/98, Judgment of the Court, June 4, 2002, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61998J0367:EN:HTML.

[9] For a discussion of these efforts by Member States, *see The Agenda for Europe - Economy and Competitveness*, remarks by Commissioner Charlie McCreevy, Internal Market Commissioner, Sept. 3, 2005, *available at*: http://www.euractiv.com/29/images/Speech%20McCreevy_tcm29-143848.doc. *See also*, George Parker and John Thornhill, *France reminded of takeover laws*, Financial Times, Aug. 30, 2005, at 7.

and state legislatures, within constitutional bounds, are free to pass laws that displace competition and aid particular industries or companies. But just because they *can* displace competition does not mean that they *should*. And, at a minimum, before replacing competition with regulation, policymakers should understand the potential impact that regulation may have on consumers. That is why the Federal Trade Commission is as vigilant to government-imposed restrictions on competition as it is to private restrictions and why it has an increasingly active competition advocacy program, which we implement often in conjunction with the Department of Justice Antitrust Division.

By now, the benefits of competition to our economy and our citizens are well-known and accepted. Indeed, perhaps aided by the prominence of sports in our culture, many of us enjoy, and may even thrive on, the challenges of competition. To compete effectively, we look for ways to improve our performance, including taking advantage of a competitor's weakness.

Competition, though, is tough on weaker competitors, prompting some to avoid competition if they can. They might try to persuade their competitors to enter into a cartel so that all in that industry can relax and not worry about dog-eat-dog competition; or, they might seek by anticompetitive acquisition to become the only remaining firm in their industry. These are, however, risky competition-avoidance strategies, given the robust nature of competition enforcement around the world.

So, instead, those who fear competition might seek protection from their government. On a mission, they travel to their capital and, if they are fortunate, are granted succor. In a nation that prides itself on its competitiveness, it seems that some enjoy competing for anticompetitive benefits. While consumers are fortunate that efforts to seek protection from competition fail

more often than not, such efforts still succeed more often than they should. The United States Code contains dozens of exemptions and immunities from competition. In fact, the U.S. Antitrust Modernization Commission recently sought public comments on 31 immunities or exemptions from the antitrust laws.[10] Among the industries enjoying some degree of protections are agriculture, fishing, insurance, shipping, motor transport, and export associations. In addition, at the state and local levels of government, a number of industries, especially services and professions, enjoy some measure of relief from the demands of competition.

As I said, there is no question that Congress can decide to displace competition or exempt a particular industry or participants from the reach of the antitrust laws. And state governments, under the state action doctrine first established in *Parker v. Brown*,[11] can establish regulatory schemes that effectively exempt private parties from antitrust liability, provided the schemes meet the doctrine's requirements of clear articulation of the law and active supervision of the regulatory scheme by the state.[12] Whether they should do so as a matter of sound public policy, however, is a different question.

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[10] U.S. Antitrust Modernization Commission, Request for Public Comment, Immunities and Exemptions, 70 Fed. Reg. 28902–28907 (May 19, 2005), *available at* http://www.amc.gov/comments/request_comment_fr_28902/immunities_comments.pdf.

[11] 317 U.S. 341 (1943). The Supreme Court's decision in *Parker v. Brown* was based on the relatively non-controversial notion that, when Congress enacted the Sherman Act in 1890, it intended to protect competition and not to limit the states' sovereign regulatory power. Thus, pursuant to the doctrine, actions that could be attributed to "[t]he state itself" would be exempt from antitrust scrutiny.

[12] *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980).

B. Recent U.S. Developments Against Anticompetitive Public Measures

1. FTC State Action Task Force

Upon his return to the FTC in 2001 as its Chairman, my predecessor, Tim Muris, established a task force to take a fresh look at the state action doctrine case law. He was not alone in his concerns about the potential anticompetitive effects of an overly broad state action doctrine. The Antitrust Section of the American Bar Association, in its 2001 report on the state of federal antitrust enforcement, stated that "[s]tate action immunity drives a large hole in the framework of the nation's competition laws."[13] Chairman Muris asked the task force to make recommendations on how to guide the development of state action case law.[14]

The "clear articulation" and "active supervision" requirements of the state action doctrine have been the subject of varied and controversial interpretations, sometimes resulting in unwarranted expansion of the exemption and the shielding of essentially private anticompetitive conduct. At times, courts have failed to consider carefully whether the anticompetitive conduct in question was truly necessary to accomplish the state's objective. Other courts have granted a broad exemption to quasi-official entities, including entities composed of market participants, with only a tangential connection to the state. Many of the competition policy concerns still center on the question of what actions should be attributed to "the state itself." Because

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[13] American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement - 2001*, A Report of the Task Force on the Federal Antitrust Agencies - 2001, at 42, *available at* http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf.

[14] In September 2003, the Task Force published a detailed report that identified specific problems in the state action case law and made a number of recommendations regarding how courts commentators might best clarify the doctrine. *See* Federal Trade Commission, Report of the State Action Task Force (2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

unwarranted expansion of the doctrine can result in substantial cost to consumers, the FTC has pursued both enforcement actions and advocacy efforts directed at limiting such expansion.

2. Enforcement

The U.S. agencies, as well as the European Commission,[15] have found that many states adopt measures that shelter service providers from competition by immunizing the setting of rates and terms of service from the antitrust laws. Ironically, governments sometimes claim that these are consumer protection measures when, in fact, they may harm consumers by needlessly raising prices for services.

a. Service Industries: *Kentucky Household Movers*

The first major enforcement initiative that resulted from the work of the FTC State Action Task Force focused on the household moving industry because there was evidence that some states did not adequately supervise the setting of tariffs by the associations of members of this industry. The moving and storage industry is an important one in this country. Americans are mobile. As reported recently in *The Economist*, between 1995 and 2000, almost half of all

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[15] At a conference in Brussels in October 2003, former Competition Commissioner Mario Monti described the magnitude of the impact of professional regulation on European consumers and suggested several approaches to deal with them. Mario Monti, Comments and concluding remarks at the Conference on Professional Regulation, Brussels, Oct. 28, 2003, *available at* http://europa.eu.int/comm/competition/speeches/text/sp2003_028_en.pdf. A study of the regulation of accountants, architects, engineers, lawyers, and pharmacists in thirteen EU Member States revealed wide disparities in levels of regulation between Member States and also between different professions. Economic impact of regulation in the field of liberal professions in different Member States, Study for the European Commission, DG Competition, by Institute for Advanced Studies, Vienna, January 2003, *available at* http://europa.eu.int/comm/competition/liberalization/conference/libprofconference.html#study. Countries such as Austria, Italy, Germany, and Luxembourg have particularly high levels of regulation, including severe restrictions to competition such as price fixing, recommended prices, and advertising prohibitions. Anne-Margrete Wachtmeister, Overview of the Commission's stocktaking exercise, remarks before the Conference on Professional Regulation, Brussels, Oct. 28, 2003, *available at*: http://europa.eu.int/comm/competition/liberalization/conference/speeches/anne_margrete_wachtmeister.pdf. It also found that there was no indication of malfunctioning of markets in relatively less regulated countries. On the contrary, the conclusion of the study was that more freedom in the professions would allow more wealth creation.

Americans changed addresses.[16] Census Bureau studies, on which *The Economist* report was based, predict that this year around 40 million Americans - one in seven or, put another way, the entire population of Spain - will move their home.[17] Thus, there is substantial and apparently sustained demand for the services of household movers.

Since 2003, the FTC has brought enforcement actions against the household movers associations in seven states and entered into consent orders in six. This past July, after a trial before an administrative law judge and review by the full Commission, the FTC ruled that the Kentucky Household Goods Carriers Association, an organization of moving companies, had engaged in illegal horizontal price-fixing by participating in the collective setting of the rates that the movers charged to most consumers.[18] The Association claimed that its conduct was shielded from the antitrust laws by the state action doctrine. The primary issue was whether the state agency responsible for supervising the Association's ratemaking had engaged in the "active supervision" that is necessary for the state action doctrine to apply. The Commission found that the state agency's conduct fell far short of what was required to meet the active supervision requirement because the agency had no formula or methodology to determine whether the movers' rates were reasonable, and the agency did not even obtain any cost and revenue data that

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[16] John Parker, *Centrifugal Forces*, The Economist, July 14, 2005 Survey of America, *available at* http://www.economist.com/surveys/displayStory.cfm?story_id=4148826.

[17] Jason P. Schachter, Geographical Mobility 2002-2003, Current Population Reports, U.S. Census Bureau, March 2004, *available at* http://www.census.gov/prod/2004pubs/p20-549.pdf. According to this study, 59 percent of all moves in 2003 were within the same county, 19 percent were to a different county within the same state and another 19 percent were to a different state. Perhaps coincidentally, the Census Bureau statistics show that about half of these moves were simply to change housing while about 15 percent are due to work-related reasons.

[18] Opinion of the Commission, *In the Matter of Kentucky Household Goods Carriers Association, Inc.*, Dkt. No. 9309 (June 23, 2005); *available at* http://www.ftc.gov/os/adjpro/d9309/050622opinionofthecommission.pdf.

would allow it to make this determination. The Kentucky Movers have appealed the Commission's decision to the U.S. Court of Appeals for the Sixth Circuit, where the case is now pending briefing and argument.

b. Professional Services: *South Carolina State Board of Dentistry*

In a case in which the Commission found the "clear articulation" requirement of the state action doctrine lacking, the FTC staff challenged a rule issued by the South Carolina State Board of Dentistry. The rule restricted the ability of dental hygienists to provide on-site preventive dental services, including cleanings, sealants, and fluoride treatments, to children in South Carolina schools. The FTC staff alleged that the Board acted unlawfully in adopting an emergency regulation that reimposed a requirement that dentists pre-examine patients before dental hygienists could provide treatment in school settings. The complaint alleged that the Board's actions hindered competition and deprived thousands of school children – particularly economically disadvantaged children – of the benefits of preventive oral health care.[19]

The defendants filed a motion to dismiss that maintained that the Board's conduct was protected by the state action doctrine. FTC denied the motion, ruling that the defendants' actions were not protected by the doctrine because the Board's rule was not issued pursuant to a clearly articulated state policy. On the contrary, the Commission found that in 2000 the South Carolina legislature had amended the South Carolina statutes to make it *easier* for dental hygienists to provide preventive services in a school setting. In particular, the legislature eliminated the requirement that the patient must have been examined by a licensed dentist within 45 days prior

[19] Opinion of the Commission (July 30, 2004), *In the Matter of South Carolina State Board of Dentistry*, FTC Docket No. 9311, *available at* http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf.

to the treatment by a dental hygienist. Because the Board's rule reinstated that requirement, the Commission concluded that it was clearly inconsistent with the policy established by the legislature and, therefore, that the Board had not satisfied the clear articulation requirement. The matter is now pending in the Court of Appeals for the Fourth Circuit.

3. Advocacy

As effective as our enforcement efforts may be, they are not enough. Sometimes, even when we win, we may ultimately lose if the businesses involved succeed in persuading the government to protect them from competition. For example, in 1998, the FTC obtained a consent agreement with a group of Chrysler automobile dealers. These dealers were losing sales to a competing dealer selling vehicles at discount prices over the internet. They responded by threatening to refuse to sell certain Chrysler models and to limit warranty service unless Chrysler limited its allocation of vehicles to the internet seller. The FTC alleged that these dealers were engaging in a group boycott, and the dealers entered into a consent agreement with the FTC. That was not, however, the end of the story. Auto dealers now have succeeded in persuading legislatures in all 50 states to enact laws prohibiting direct vehicle sales by manufacturers and online sellers without a franchise presence.[20] This highlights the need for, and importance of, competition advocacy before legislatures and government regulatory bodies.

a. Real Estate

One profession on which we, along with DOJ, have focused lately relates to all of those moves that I talked about a few minutes ago. The vast majority of residential real estate sales

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[20] Timothy J. Muris, State Intervention/State Action - a U.S. Perspective, 2003 Fordham Corp. L. Inst. 517, 520 at note 9 (B. Hawk ed. 2004); *available at* http://www.ftc.gov/speeches/muris/fordham031024.pdf.

involve real estate brokers, who help both home buyers and home sellers. Traditionally, real estate brokers and their affiliated agents have performed virtually all services relating to the sale of a home, including marketing the home, negotiating with potential buyers, and helping to coordinate the closing of the transaction.

Several related developments are presenting challenges to this traditional brokerage model. In response to perceived consumer demand, some real estate professionals are offering to provide only those services a home seller wants, rather than an entire package of services. In so-called "fee-for-service" or "limited-service" brokerage models, a home seller might, for example, choose to pay a broker only for the service of listing the home in the local Multiple Listing Service and placing advertisements, and choose to handle the negotiations and paperwork himself or herself. Several states have considered or passed laws or regulations that would effectively curtail fee-for-service brokerage. Further, some states have either passed new laws or regulations, or interpreted existing laws or regulations, to prevent brokers from passing a portion of their commissions along to consumers.

The FTC and the DOJ have been actively involved in analyzing potential restrictions on competition in the real estate brokerage industry. Recently, the FTC and the DOJ have jointly advocated against the passage of laws and regulations in a number of states that would have effectively limited consumers' ability to purchase a more limited, less expensive, set of real estate services.[21] Thus far, our efforts have not been very successful, as several state legislatures

[21] Letter from the FTC and the Justice Department to Governor Matt Blunt (May 23, 2005) *available at* http://www.ftc.gov/opa/2005/05/mrealestate.htm; Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005), *available at* http://www.ftc.gov/os/2005/05/050512ltralabamarealtors.pdf; Letter from the FTC and the Justice Department to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm'n. (Apr. 20, 2005), *available at* http://www.ftc.gov/os/2005/04/050420ftcdojtexasletter.pdf.

have imposed statutory restrictions on real estate brokers that likely will limit the range of services available to consumers. Given the importance of these services to consumers and the issues involved, I am pleased to announce that the FTC and the Justice Department plan to hold a workshop on competition and real estate on October 25.[22] One of the factors that the conference will focus on is state actions that inhibit competition in the market.

b. Gasoline Minimum Price Controls

Another example of competition-shielding laws relates to the industry that affects all of us every day: gasoline. At a time when retail gasoline prices have been climbing, it is inconceivable that states would have laws that prohibit the selling of gasoline too cheaply. But, in fact, eleven states have so-called "sales-below-cost" laws that are directed at mass merchandisers like Wal-Mart and Costco and that prevent retailers from selling gasoline at prices that fall below a statutorily set measure of cost. These laws expose retailers to liability if they sell gasoline too cheaply, even if the prices do not injure competition. In short, these laws discourage competitive pricing in gasoline. The FTC has advocated strongly against the passage of such laws and, fortunately, some states have dropped their proposals to enact them. For example, in 2002, we opposed such a bill in New York, and the governor pocket-vetoed the bill

[22] "Federal Trade Commission/Justice Department to Host Joint Workshop on Competition Policy and the Real Estate Industry," FTC Press Release, Sept. 13, 2005, containing link to Federal Register notice, *available at* http://www.ftc.gov/opa/2005/09/comppolicyworkshop.htm.

in February 2003.[23] We opposed similar laws in North Carolina, Michigan, and Kansas in 2003 and 2004, all of which later died in committee.[24]

c. Interstate/Internet Wine Sales

In July 2003, the FTC staff issued a report on state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers.[25] Direct shipment is a growing and potentially important alternative to the traditional tightly-regulated, three-tiered system of producers, licensed wholesalers, and retailers. Many states, however, ban or severely restrict the direct shipment of wine to consumers, thereby creating an entry barrier for numerous, particularly small, wineries seeking to sell their products online.

The FTC staff report, reflecting the unique interest and sensitivity of the Commission both to competition and consumer protection concerns, concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine. The report supported this conclusion with a study conducted by FTC economists, which showed that many wines available to consumers online are not available in local retail outlets.[26] Specifically, the study of wine

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[23] FTC Staff Comment to the Honorable George E. Pataki Concerning New York Bill Nos. S04522 and A06942 Regulating Gasoline Sales (Aug. 2002) (V020019), *at* http://www.ftc.gov/be/v020019.pdf.

[24] FTC Staff Comment to the Honorable Roy Cooper and the Honorable Daniel Clodfelter Concerning North Carolina H.B. 1203 / S.B. 787 to Amend North Carolina's Motor Fuel Marketing Act (May 2003) (V030011); *available at* http://www.ftc.gov/os/2003/05/ncclsenatorclodfelter.pdf. FTC Staff Comment to the Honorable Gene DeRossett Concerning Michigan H.B. 4757, the "Petroleum Marketing Stabilization Act" (Jun. 2004) (V040019); *available at* http://www.ftc.gov/os/2004/06/040618staffcommentsmichiganpetrol.pdf. FTC Staff Comment to the Honorable Les Donovan Concerning Kansas H.R. 2330 Prohibiting a "Marketer" or "Retailer" From Selling Motor Fuel Below Cost (Mar. 2004) (V040009); *available at* http://www.ftc.gov/be/v040009.pdf.

[25] POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, REPORT OF THE STAFF OF THE FTC (Jul. 2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[26] The study is appended to the FTC staff report, and it was published separately as an FTC Bureau of Economics Working Paper, Alan E. Wiseman and Jerry Ellig, How Many Bottles Make a Case Against Prohibition? (Mar. 2003) (FTC Bureau of Economics Working Paper No. 258), and later published as Alan E. Wiseman and Jerry

retailing in McLean, found that 15% of a sample of popular wines available online were not available in retail locations in or close to McLean. In addition, this small-sample study also found that consumers could save money by purchasing more expensive wines online. Assuming the least expensive shipping method is used, the study found that consumers could save an average of 8-13% on wines costing at least $20 per bottle, and an average of 20-21% on wines costing at least $40 per bottle.

The report also examined concerns about the direct shipment of wine to consumers, given that underage drinking is a serious health and safety issue. The report concluded that there is no systematic evidence of problems of internet-related shipments to minors. Moreover, the report noted that safeguards, such as checking identification at delivery, may address these concerns, and that some states have successfully followed this less restrictive approach.

This past summer, the Supreme Court relied extensively on this FTC staff report in its decision involving interstate wine sales.[27] In *Granholm v. Heald*, the Court struck down Michigan's and New York's discriminatory restrictions on interstate direct wine shipping. Writing for a 5-4 majority, Justice Kennedy relied on the FTC's report multiple times for information about the characteristics of the wine industry. Justice Kennedy also frequently cited the report to support the Court's finding that neither state's law advanced a legitimate local purpose that could not be addressed by reasonable nondiscriminatory alternatives. Responding to the states' argument that the laws were needed to protect minors, the Court cited the report's finding that the 26 states that currently allowed direct shipments reported no evidence of

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Ellig, *Marketing and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6:2 Business and Politics 5.

[27] *Granholm v. Heald*, ___ U.S. __, 125 S. Ct. 1885 (2005).

increased alcohol sales to minors. The Court also relied on the report for its finding that the states' laws were not needed to maintain tax revenue levels, facilitate orderly market conditions, protect public health and safety, or ensure regulatory accountability.

d. Eurex

The Commission also weighed in on an attempt by incumbents to block the entry of a new futures trading exchange. In January 2004, the FTC filed comments with the Commodities Futures Trading Commission ("CFTC") on an application by Eurex, a German-Swiss exchange, to set up an all-electronic operation in the United States to compete with the Chicago Board of Trade and the Chicago Mercantile Exchange. Not surprisingly, the incumbent exchanges opposed the application, arguing that the new entrant could engage in predatory pricing. Although the FTC did not examine or endorse this particular applicant's submission, we argued that new entry would benefit consumers of futures trading services, while conversely, allowing an entry barrier could have stifled innovative services and led to higher prices. In addition to reminding the CFTC of the benefits of competition and new entry generally, the comment pointed to economic studies showing that the presence of multiple exchanges increases competitive pressure and leads to significantly smaller bid-ask spreads, thereby likely enhancing consumer welfare. Moreover, entrants with new business models might have a significant impact on prices and services, and electronic trading systems may lower the cost of executing trades.

The CFTC ruled in the applicant's favor. CFTC Commissioner Lukken indicated that he had placed great weight on the FTC's analysis in supporting the decision to designate another U.S. futures exchange.[28] Initially, reports from the business press describe how trading volume

[28] See CFTC Release, *available at* http://www.cftc.gov/opa/press04/opausferemarks.htm.

increased and the incumbent exchanges lowered their trading fees substantially in reaction to the new competitive threat in the market for U.S. Treasury futures contracts.[29] Recent reports indicate that Eurex did not survive in the United States and that trading fees appear to be on the rise.[30]

III. Conclusion - the U.S. and EU Face Similar Challenges

Now, perhaps, you can see that the FTC and the EC have quite similar tasks with respect to government action that displaces competition. The competition-displacing powers of government in the United States and the EU Member States appear to be quite similar, albeit having arrived at that point from opposite directions. In the United States, the Supreme Court at first, in *Parker*, appeared to broadly immunize state action, but has gradually clarified its doctrine to place certain obligations on states if they are to exercise their sovereign authority to displace competition. Europe seems to have come to this point from the other direction - the Member States are obliged to fulfill the EU Treaty, but the courts have found that the Treaty gives the Member States some authority to displace competition. Functionally, courts in the United States and Europe are faced with at least one critical issue in common when State regulatory schemes are called into question: Whether the State has delegated authority to collectively set prices or other terms to private persons who will benefit directly from the determination.

What is critical is that we, as competition authorities, not only support competition through enforcement but that we champion competition through persuasive input into public

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[29] *Chicago Takes on Europe*, BUS. WEEK., Jul. 5, 2004, at 76-77.

[30] Jeremy Grant, *Chicago exchange victories trigger alarm over fees: With European rivals having been seen off there is now concern in the industry about the effects on business of reduced competition*, FINANCIAL TIMES, Sept. 12, 2005, at 26.

policymaking. At the FTC, we will continue our efforts and look forward to working with our EC counterparts.